

PART 5349--TERMINATION OF CONTRACTS

PART 5349--TERMINATION OF CONTRACTS

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SUBPART 5349.1--GENERAL PRINCIPLES**5349.101 Authorities and responsibilities.****5349.101-90 Processing Air Force terminations for convenience.**(a) Initiation of Termination Authority, AF Form 3056.

(1) The activity (except HQ USAF and MIPR actions) which initiated or subsequently assumed responsibility for the original procurement request will complete AF Form 3056, part I, "Termination Request," and forward the form to the procuring contracting officer (PCO) by the most expeditious method available. To avoid unnecessary additional cost incurrence, use telephonic (confirming AF Form 3056 required) or an electronic means to transmit AF Form 3056, part I. Annotate the time and date of transmittal to the PCO on the form.

(2) Initiating activities will not discuss reduction in requirements or proposed termination actions with the contractor before the contractor has received the termination notice.

(b) PCO responsibilities. The PCO shall--

(1) Upon receipt of the AF Form 3056, record the time and date on the form. Also annotate the time and date of receipt of telephone instructions to initiate termination in the contract file, along with the name and telephone number of the individual requesting the action;

(2) Review the AF Form 3056 for completeness and accuracy and ensure that the termination is in the best interest of the Government. The PCO should attempt to resolve minor problems on AF Form 3056, part I, without interrupting the termination process;

(3) When the termination is under a MIPR or HQ USAF directive, prepare AF Form 3056, part I, as applicable;

(4) Request the appropriate supply activity to furnish instructions relating to termination of spare parts, tools, and aerospace ground equipment pertaining to the particular end item to be terminated. Processing an AF Form 3056 relating to an end item will not be delayed pending receipt of instructions pertaining to the item's spare parts;

(5) Complete AF Form 3056, parts I, II, and III, as applicable, and expedite transmittal to the termination contracting officer (TCO);

(6) When the contract involves Government property, notify the property administrator and annotate the AF Form 3056 that this action has been taken;

(7) Complete action within eight working hours or document the reason for delay on AF Form 3056, part III, "Remarks;" and

(8) Obtain clearance for release of information on significant terminations pursuant to 5349.7001.

(c) TCO Responsibilities. The TCO shall--

(1) Upon receipt of the AF Form 3056, annotate the time and date on the form;

(2) Review the AF Form 3056, the contract or order, and relevant documents to independently ascertain whether the termination should be for convenience or for default. The TCO is not required to accept the recommendations in item 15 of the AF Form 3056. When items or services are no longer required or the contract delivery schedule has expired, default termination may still be appropriate;

(3) When appropriate, issue a Notice of Termination for Convenience to the contractor with a copy to the contract administration office (CAO) responsible for the settlement. The termination notice will normally be issued to the contractor within three working days after receipt of AF Form 3056. The TCO shall document the reason for any delay on AF Form 3056, part III, "Remarks;" and

(4) Within seven working days from the effective date of termination, furnish a copy of the AF Form 3056 directly to the cognizant CAO or other activity responsible for the termination settlement. The PCO shall retain termination settlement responsibility on terminations, regardless of dollar amount, when contract administration has been retained by the PCO under DFARS 242.203 or if the PCO can negotiate a no-cost settlement agreement. Normally assign other contracts that are terminated for convenience to the cognizant CAO for termination settlement in accordance with 5349.101-90(d).

(d) Referral to a CAO. When referring a termination case to a CAO for settlement, the referring office will provide the ACO with the following--

(1) One copy of the terminated contract including all contract modifications;

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- (2) One copy of the AF Form 3056;
- (3) Amount and dates of payments made under the contract;
- (4) Four copies of the termination notice; and
- (5) Any other information that may be helpful in negotiating the settlement (e.g., instructions for disposition of the termination inventory).

(e) Delegation of authority. Termination of a contract is not a normal CAO function. Therefore, if the ACO is to be responsible for the actions in paragraphs (b), (c), and (d) above, the PCO must issue a specific delegation. To ensure availability of resources, first obtain the ACO's agreement.

5349.109 Settlement agreements. The TCO shall obtain a legal review regarding the legal sufficiency of the termination settlement agreement and any modifications thereto.

5349.111 Review of proposed settlements. Establish settlement review boards commensurate with workload and include legal and pricing representatives. Settlement review boards should review and approve settlement agreements, unilateral determinations, agreements in lieu of default, and subcontract settlements, if--

- (1) The settlement amount, as determined in accordance with FAR 49.002, exceeds \$250,000 for fixed-price contracts; or
- (2) The adjusted fee on completely terminated cost contracts exceeds \$50,000 or the adjusted fee on the terminated portion of a partially terminated cost contract exceeds \$50,000.

tion is to compare the actual costs incurred with the estimated cost to complete the contract, adjusting the resulting percentage according to the difficulty or importance of each type of cost. Under this method, the contracting officer should prepare a breakdown of the estimated costs negotiated in connection with awarding the contract and an estimate of the cost to complete each category of items as shown in the contractor's settlement proposal.

(2) In determining the extent of completion, each category of work accomplished is separately evaluated, giving greater weight to those elements which reflect the more substantial or significant work. Thus, if the production costs disclosed that a large quantity of raw material was received upon which only a small amount of direct labor hours had been incurred when compared with the direct labor hours originally estimated under the entire contract, then it would be obvious that very little fabrication or

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SUBPART 5349.3--ADDITIONAL PRINCIPLES FOR COST REIMBURSEMENT CONTRACTS TERMINATED FOR CONVENIENCE

5349.305 Adjustment of fee.

5349.305-1 General.

(a) The standard termination clause for cost reimbursement contracts (FAR 52.249-6) provides that the TCO and the contractor negotiate the settlement of the fee. Any method which is fair and equitable to both parties may be used. When the parties are unable to agree on the adjustment, the percentage of completion formula contained in the contract clause should be used.

- (1) One method of estimating the percentage of comple-

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work-in-process had been performed on the material. In such cases, the allowable percentage of fee relating to the direct material should be considered in the nature of a handling charge and weighted lower than other categories of costs. This same method of evaluation can be applied to tooling costs, engineering, and other costs listed in the claim.

(3) In evaluating the category of tooling costs, ensure that completed tooling on hand at the time of termination represents all the tooling required under the entire contract. The fact that the contractor has on hand complete tooling in connection with that portion of the contract which has been performed does not mean that the tooling is 100 percent complete. In order for the tooling to be 100 percent complete, it must be all the tooling, including maintenance of such tooling which would have been required had the contract been fully performed.

(b) Another method of estimating the percentage of completion is to have the requiring activity evaluate the percentage of completion of contract work from a strictly technical standpoint. The TCO should ensure that the technical evaluation is based on physical completion and not on costs incurred as such costs may represent a substantial overrun or underrun of the estimated costs.

(c) Estimating the ratio of costs incurred to the total estimated costs of performing the contract is another method of estimating percentage of completion. However, as any substantial cost overrun or underrun could result in a misleading physical percentage of completion, and since this method does not take into consideration the various degrees of complexities or difficulties of the work accomplished, this method should rarely be used. This method should only be used as a check on the estimates resulting from the methods described in paragraphs (a) and (b) above.

(d) Under no circumstances will the negotiation of the fee be used as a device for allowing contractor costs which would otherwise be unallowable.

SUBPART 5349.4--TERMINATION FOR DEFAULT**5349.402 Termination of fixed-price type contracts for default.****5349.402-3 Procedure for default.****(a) Responsibility of the ACO.**

(1) ACOs have primary responsibility for evaluating and initiating possible termination of contracts including, with the PCO's concurrence, issuance of "show cause" and

"cure" notices, when appropriate. Within 5 days after receipt of the PCO's concurrence, the ACO will provide the appropriate notice to the contractor by letter, Certified Mail-Return Receipt Requested, or, in the alternative, personally delivered to the contractor. In the latter case, a receipted copy should be obtained. Before either notice is released, it should be coordinated with the cognizant production and quality assurance personnel. Upon release of a cure notice or a show cause notice to the contractor, the ACO shall provide, as applicable, copies of the notice to--

(i) The office with primary production responsibility;

(ii) The office with primary quality assurance responsibility;

(iii) The PCO;

(iv) Contractor's sureties, assignees or guarantors;

(v) The cognizant TCO;

(vi) The cognizant finance office;

(vii) The office of primary engineering responsibility; and

(viii) Other government personnel (e.g., Industrial Security Specialist, Defense Contract Auditor, and the SBA).

(2) At the expiration of the cure period in the case of a "cure notice" or upon receipt of the contractor's reply to a "show cause" notice, the ACO will immediately send the following information in writing to the PCO:

(i) In the case of a "cure notice," the ACO's evaluation of whether the contractor has satisfactorily cured the problem;

(ii) In the case of a "show cause" notice, the contractor's reply;

(iii) The ACO's evaluation of the situation, including the ACO's estimate of the time necessary for the contractor to complete the contract;

(iv) The ACO's current data on the status of production, as applicable; and

(v) The ACO's recommendation as to whether the contract should be terminated for default or the delivery period extended.

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(3) After a contract has been referred to the TCO for default investigation, the ACO will obtain TCO approval for any action contemplated for the contract, including--

- (i) Authorizing Government personnel to visit the contractor's facility in connection with the contract; and
- (ii) Accepting delivery of items under the contract.

TCO approval is not required in connection with administration of other contracts with the same contractor that are not under default investigation. However, all Government personnel should refrain from discussing any aspects of contracts being investigated for possible default termination unless specifically requested to do so by the TCO.

(4) On receipt of information that a notice of default termination has been issued to the contractor, the ACO will determine the exact amount of funds unexpended under the contract as of the effective date of the default termination, and promptly notify the PCO.

(b) Responsibility of PCOs.

(1) PCO's shall decide if a contract should be submitted to a TCO for default investigation.

(2) Within 10 working days after receiving a recommendation from the ACO that the contractor should be issued a "show cause" or a "cure" notice, the PCO shall--

- (i) Notify the ACO of concurrence or nonconcurrence;
- (ii) issue the "cure" or "show cause" notice directly to the contractor, providing a copy to the ACO; or
- (iii) notify the ACO as to when a decision is expected.

(3) After reviewing the ACO's recommendations regarding possible default termination (see 5349.402-3(a)), the PCO shall decide whether to pursue default action. In making the decision, the PCO will consider the following, in addition to the factors in FAR 49.402-3(f):

- (i) Any Government action which contributed to the contractor's failure to perform; and
- (ii) Any liquidated damages which may be assessed under the contract.

(4) When requesting an investigation for default, the PCO shall immediately give the TCO the official contract file including the AF Form 3056. The TCO shall return the file to the PCO upon reproduction of the documents

extracted. As an alternative to the submitting the official file, if the TCO agrees, the PCO may submit a copy of the file with a signed statement that includes the following--

(i) A detailed description of how the contractor has failed to comply with the contract and of actions taken by the Government and by the contractor. This portion of the statement should include the exact dates when performance is due, considering all changes and any Government-caused delay. It should be supported by signed statements from individuals having personal knowledge of the contractor's failure;

(ii) An evaluation of any explanation by the contractor to explain its deficiency, with a specific comment as to whether the Government, by its acts, may have contributed to the contractor's failure to perform;

(iii) A statement of all deliveries and payments under the contract to date;

(iv) The method of selection of source used at the time of placing the contract and why the contractor was selected;

(v) The urgency of the current need for the supplies or services;

(vi) An estimate of the period of time required to obtain the supplies or services from other sources;

(vii) An estimate of the time necessary for delivery from the delinquent contractor;

(viii) Any damages, other than excess cost of reprocurement, which may result from the contractor's failure to perform. This includes the potential loss of guaranteed loans, unliquidated progress payments, and unliquidated advance payments; and

(ix) Any other facts which the PCO believes should be considered during the default investigation.

(5) Before forwarding the request for default investigation, the PCO should consult with the local staff judge advocate and the using organization, if time permits. The PCO should promptly advise the TCO of any significant changes in the information in the AF Form 3056.

(6) The PCO will notify the ACO promptly of any action taken in relation to default termination. Thereafter, the PCO will assist the TCO to the maximum extent possible.

(c) Responsibilities of the TCO.

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(1) Before initiating a default termination, the TCO shall--

(i) Conduct a thorough review of the official contract file, the AF Form 3056, Termination Authority, and its attachments, and all other relevant documents. If the default is being recommended as a result of poor performance or defective workmanship, the TCO should, if practical, visit the site of the work to observe the existing conditions and to aid in the formation of an independent opinion. Pictures should be taken in appropriate cases to provide visual evidence in support of the TCO's decision to default;

(ii) Send the contractor a show cause notice if appropriate (see FAR 49.607);

(iii) If the facts support issuing a termination for default, prepare and forward the termination notice with the complete contract file to AFMCLC/JAB, if required, in accordance with 5333.211;

(iv) If the facts are insufficient to support a default termination, the TCO may negotiate a supplemental agreement with the contractor. If negotiation fails to provide a satisfactory solution, the TCO may terminate for default or for convenience, as appropriate, or in the alternative, take actions as outlined in FAR 49.402-4; and

(v) If time and resources permit, the TCO should provide informal advice to aid the PCO in possible default cases.

(2) Additional responsibilities of the TCO. Upon receipt of AF Form 3056, the TCO shall--

(i) Assume full cognizance over the contract and advise the contractor of the transfer of cognizance. After referral to the TCO, the initiator of the AF Form 3056 will not take any action pertaining to the contract without obtaining prior approval from the TCO;

(ii) Reestablish the delivery schedule, if it has been waived by the Government. Before reestablishing the delivery schedule, the TCO should consult with the initiator of the AF Form 3056 and with the ACO. The TCO may either retain cognizance over the contract until it is completed or terminated or else transfer cognizance back to the ACO;

(iii) Provide copies of each notice of default termination and of each assessment of excess costs to DFAS-CO-FDP, P.O. Box 93031, Chicago, IL 60673-3031 and AFMCLC/JAB; and

(iv) If the contract is terminated for default, request the PCO to furnish detailed information relating to repurchase of similar supplies or services and the total amount of any excess costs incurred by the Government as a result of the contractor's default. Based upon this information received from the PCO, the TCO will prepare findings to base a demand on the defaulted contractor, its sureties and guarantors in accordance with FAR 32.610. If the paying office has retained funds due the defaulted contractor for work performed under the contract, the TCO will direct the paying office to apply these funds to amounts owed the Government and will issue a revised demand to reflect this application of funds.

(3) If the ASBCA sustains the contractor's appeal, and a motion for reconsideration is not made or is denied, the TCO will, upon receiving a copy of the ASBCA decision from AFCLC/JAB, issue a notice converting the termination to one for convenience. The TCO may either retain the case for settlement or forward it to the ACO. If transferring the case, the TCO will prepare and submit the DD Form 1594, Contract Completion Statement, to the PCO. If retaining the case, the TCO shall use termination for convenience procedures. The default docket file should be available to the TCO assigned to negotiate the settlement of the convenience termination.

(4) Default termination files will be closed when--

(i) The decision of the ASBCA or court has become final;

(ii) Assessments have been paid by the contractor or have been determined uncollectible by DFAS-CO-FDP; or

(iii) When no assessment has been made and the time for the contractor to appeal has expired.

(5) Upon closing the termination file, the TCO will prepare the DD Form 1594, Contract Completion Statement, and send it to the PCO. The "Remarks" space of DD Form 1594 will contain the following statement:

"This contract was terminated for default of the contractor by notice dated....Items 6a and 6b above are not applicable. This termination file was closed on...."

5349.402-6 Repurchase against contractor's account. The contracting officer may not waive the defaulted contractor's liability for any additional costs to the Government

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of the subsequent reprourement of supplies or services. For a contract containing two or more line items, the defaulted contractor is liable only for the net cost increase to the Government considering all items which were reprocured. Unreasonable delay in reprourement, reprourement on the basis of a specification which is materially changed, or reprourement prior to the issuance of the default notice to the contractor may release a contractor from liability for additional costs.

5349.5--CONTRACT TERMINATION CLAUSES

5349.501-70 Special termination costs. Forward requests to include the clause at DFARS 252.249-7000 to SAF/AQCS with sufficient justification to support a decision by the Assistant Secretary of the Air Force for Acquisition (ASAF(A))(non-delegable). Requests must be submitted at least 60 calendar days in advance of intended use so Congressional notification can be accomplished as required by Senate Appropriations Committee Report 103-321. Secretarial approval is required for any increase in the Government's maximum liability under the clause. Include—

(1) A detailed breakdown of applicable the cost categories in the clause at DFARS 252.249-7000(a)(1)-(5). Provide the reasons for the anticipated incurrence of each;

(2) Information on the financial and program need for the clause including an assessment of the contractor's financial position and the impact of a failure to receive authority to use the clause; and

(3) Clear evidence that only costs that arise directly from a termination would be compensated under the clause. Costs that would be incurred by the Government regardless of whether a termination occurs, shall not be covered by a special termination cost clause.

SUBPART 5349.70--SPECIAL REQUIREMENTS

5349.7001 Congressional notification on significant contract terminations.

5349.7001-90 Air Force Procedures.

(a) The term "Contract Price of Items Terminated (CPIT)," as used in this subpart, means the contract price(s) of supplies or services not yet accepted (but being terminated) multiplied by the quantities or periods of performance being terminated. Do not adjust downward for progress or advance payments, accepted vouchered costs, or less than full funding. Use estimates when unpriced contract actions (UCAs) are being terminated, or when otherwise necessary.

(b) Contracting Officer procedures. These procedures apply to terminations for convenience and for default. The contracting officer shall submit the request for clearance by FAX to SAF/AQCP at least five working days before the proposed termination date, as follows--

(1) Use organizational letterhead and standard letter format. Mark the letter "FOR OFFICIAL USE ONLY." Address the letter to SAF/AQCP. The "SUBJECT" shall include "Contract Termination, 1412 Report." Send the FAX to SAF/AQCP, FAX number (703) 693-5589 or DSN 223-5589. A message may be sent if a FAX machine is not available. After sending, call SAF/AQCP at (703) 695-4982 or DSN 225-4982 to confirm receipt. SAF/AQCP will distribute copies to SAF/AQC, SAF/AQCS, SAF/LLP (Legislative Liaison), SAF/PAM (Public Affairs), and other appropriate offices (e.g. the Program Executive Officer (PEO) and Program Element Monitor (PEM)).

(2) In addition to the ten items in DFARS 249.7001(d), the letter shall provide:

"(11) the name, office symbol, and phone and fax numbers of the contracting officer; (12) name, office symbol, and phone number of the termination contracting officer; (13) name, office symbol, and phone number of the MAJCOM point of contact, if any; (14) name, office symbol, and phone number of the SAF or USAF PEM, if any; and (15) the planned termination date."

(3) The termination notice shall not be released until the contracting officer receives clearance by telephone from SAF/LLP indicating the date and time Congress will be notified and the contractor should receive the termination notice. Normally this will be 1700 hours Washington, DC time. SAF/LLP will follow-up the verbal clearance with a FAX or by mail.

(c) SAF/AQC procedures. For systems and logistics contracts, SAF/AQCS and for operational contracts, SAF/AQCO will prepare and staff a package for SAF/AQ or SAF/AQC approval (based on SAF/AQC determination), as follows.

(1) The package will contain:

(i) Proposed notice to Congress (prepared with the assistance of the PEM),

(ii) Proposed press release and/or questions and answers, when appropriate (prepared by SAF/PAM), and

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(iii) Necessary background information.

(2) SAF/AQCS or SAF/AQCO will coordinate the package through the SAF/AQ organizations (e.g. the PEO and PEM), SAF/GCQ, the Air Staff, SAF/LLP, and SAF/PAM, as appropriate. SAF/LLP will coordinate with CSAF and any other appropriate offices.

(3) The package will document approval of the notice to Congress (and any press release or questions and answers) and such approval(s) will authorize-

(i) SAF/LLP to release the notice;

(ii) SAF/PAM to release the press information; and

(iii) SAF/LLP to advise the contracting officer of the date and time to present the termination notice to the contractor.

(4) SAF/LLP will notify SAF/AQCP as soon as all coordinations and approvals are complete and the contracting officer has been cleared to proceed. SAF/LLP will also provide SAF/AQCP copies of the signed notice to Congress and clearance to the contracting officer.

(d) Congressional notification of the termination of classified programs will be through program channels.

5349.7002 Notification and reporting of substantial impact on employment.

(b)The contracting officer shall forward the notification to SAF/AQCP, 1060 Air Force Pentagon, Washington DC 20330-1060, immediately upon receipt from the contractor. SAF/AQCP will accomplish the appropriate notifications.

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